NO. 48836-1-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

TACOMA SCHOOL DISTRICT NO. 10, d/b/a TACOMA PUBLIC SCHOOLS, individuals

Plaintiff,

v.

III BRANCHES, PLLC; KATHY MCGATLIN; SHEILA GAVIGAN, TRUBY PETE,

Defendants.

REPLY BRIEF OF APPELLANT/ RESPONSE OF CROSS-RESPONDENT

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I. RESPONSE TO DEFENDANTS' STATEMENT OF THE CASE

The Tacoma School District and the Defendants agree on one principle: "When interpreting a statute, the courts look at the statute's plain language and ordinary meaning." Resp. Br. P. 29 (citing *Davis v. Cox*, 183 Wn.2d 269 (2015)). Other than that common ground, there is very little in the way of facts or law that the parties agree on in this appeal.

Defendants are three employees of the Tacoma School District ("District") and their counsel who are in possession of student educational records protected by the Family Educational Rights and Privacy Act, 21 U.S.C. §1232g ("FERPA"). As dictated by FERPA, Sheila Gavigan, Kathy McGatlin, and Truby Pete (collectively, "employees") are granted access to the student educational records solely in their capacity as employees and only to fulfill legitimate educational interests on behalf of the District. FERPA makes certain exceptions regarding to whom records may be disclosed without consent of the affected student, [1]however, neither exception is present in this case. Thus, while Defendants continue to urge against a plain language reading of FERPA, the disclosure of personally identifiable information contained in student educational records to III Branches Law was a clear violation of FERPA, RCW 28A.600.475[2] and RCW 28A.605.030,[3] and District policy and procedure that conform to FERPA. Nor is there any state or federal case law that has abrogated FERPA by concluding that an employee may flout its terms in order to disclose confidential student records to an attorney not under the control of the educational agency or school district for purposes a speculative whistleblowing complaint. Finally, state law protection of communications of and between an attorney and their client is not implicated here

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[1] *See e.g.*, 34 C.F.R. Part 99.31, noting that disclosure without consent may be made to school official, such as teachers with legitimate educational interests and to contractors or consultants over whom the educational agency has direct control and who is subject to the regulations' requirements regarding redisclosure.

[2] Limiting exchange of student records and information only on court order or pursuant to subpoena.

[3] Prohibiting release of student education records without written consent of parent or guardian.

where the records pre-existed any relationship and do not contain any communications generated as a result of that relationship. As such, the records at issue in this case should have been identified and returned as requested by the District's Amended Complaint and it was an error for the trial court to grant summary judgment to the Defendants.

Defendants' brief contains some critical factual misrepresentations that must be corrected for the record and to ensure this Court is accurately apprised of the facts underlying the appealed decisions.

First, Defendants admitted they had not performed the redactions on the student educational records that plainly appeared in the King 5 news broadcast and further admitted that they had provided the records in unredacted form to their non-District attorney. Complaint, CP (2/2/15) 1-6;[4] Declaration of Gayle Elijah, 11/4/2014, CP (2/2/15) 520-522 ("During each of their interviews Ms. Pete, Ms. McGatlin, and Ms. Gavigan denied redacting student records that were provided to Ms. Joan Mell, news media outlets, and others, and indicated that Ms. Mell or her office had redacted the documents at issue.")[5]; *see also*, Div II Ruling Denying Review, 4/8/2015, p. 2-3. These admissions therefore supported the District's reasonable belief that student educational records with personally identifiable information had been unlawfully disclosed to numerous third parties.

Second, contrary to Defendants' statement, the District did not know of or have any reason to believe the records had been sequestered prior to the lawsuit being filed because **the Defendants ignored and refused to respond to all District communications regarding the student records prior to notice that the lawsuit had been filed**. Declaration of Shannon McMinimee, 10/1/14, CP (6/7/16) 10-23 ("To date,

[4] The Clerk's Papers designated in the prior petitions for review and appeal were transferred over to the instant appeal, but not renumbered to supplement the prior designations. The result is that there are multiple documents numbered 1-6. For ease of review, Appellant identifies each Clerk's Papers by CP and, in parentheses, the date on which the clerk of court transmitted the records at issue.

[5] To the extent the employees argue they did not admit this in the investigatory meeting, this would make it a material fact in dispute. See Resp. Br., p. 5 fn. 11. As such, it would be one for which summary judgment may not be premised, thus further supporting reversal. CR 56(c).

Defendants have not responded to my communications or returned the records."); *See also* Opposition to Special Motion to Strike, 11/4/2014, CP (2/2/15) 488-502; Declaration of Michael A. Patterson, 11/4/2014, CP (2/2/15) 508-519; Letter from Shannon McMinimee to Joan Mell, 10/2/14, CP (2/2/15) 106-107. Defendants' letter offering to "sequester" the educational records and suggesting a third party mediator, did not come until after they received courtesy notice of the filing of the lawsuit, despite having been warned that litigation was imminent due to the Defendants' lack of response. Not only does this fact significantly impact the narrative before this Court, it also wholly undermines Defendants' claim that they were attempting to work collaboratively with the District for purposes of obtaining access to the records lawfully. Furthermore, the King 5 statement denying that personally identifiable information had been obtained (and that could not be independently verified due to RCW 5.68.010) was received by the District **after** the lawsuit had already been filed. In sum, at the time the lawsuit was filed, based on the Defendants' stark refusal to engage or respond, the District had no choice but to pursue litigation to have its confidential student records returned.[6]

Third, Defendants suggest that the confidential student records disclosed to III Branches law are limited to those submitted to Superintendent Santorno in August 2014 and submitted to the media. This is inaccurate. The documents submitted to the trial court for *in camera* review pursuant to Order and that were purportedly the educational records provided to III Branches Law prior to the lawsuit being filed on October 1, 2014, are more than those submitted in support of the whistleblower complaint. Order on Motion to File Whistleblower Complaint, p. 3, CP (6/7/16) 525 (directing Defendants to file under seal all records provided to III Branches law and Joan Mell prior to October 1, 2014). This is evident by the fact that the documents submitted to

[6] Whether the documents containing confidential student information are the original records or copies does not change the fact that they confidential student records.

the court for *in camera* review to Judge Whitener pursuant to the Order of November 20, 2015, totaled 402 pages whereas the documents submitted with the complaint to Superintendent Santorno totaled 46 pages. *Compare*, Order on Attorney-Client Privilege, CP (6/7/16) 529 (noting bates-numbers of 1-401), against Motion to File Whistleblower Complaint Attachments, CP (6/17/16) 669 (noting bates numbers 13-58) and Dec. of Joan Mell, CP (6/17/16) 675 (Bates-numbers 13-58).

Finally, the only contradictory and confusing assertions in this matter enduring over two years have come from the Defendants themselves. At the hearing on November 7, 2014, prior to the additional 12,500 document disclosure, in response to Defendants' attempt to confuse the issue, counsel for the District directly stated, "What's not being addressed here is that [counsel for the employees] is carefully indicating to you that she is going to turn over what her clients have access to but not what she was given in unredacted form hiding behind an attorney-client privilege that she doesn't have," to which Attorney Joan Mell assured the Court, "*That is not true.*" See Opposition to Amended Special Motion to Strike and supporting Declaration of Gilliam, CP (2/2/15) 730-736. Given the issues around what documents would be subject to review, Judge Larkin did not make a ruling and instead directed the parties to work out an Order. At the time, Ms. Mell acknowledged that no Order was entered that defined or identified what documents were the subject of the Court's direction. *Id.*, p. 20:9-14. Thus, it was a shock to all involved on November 14, when Ms. Mell brazenly declared in open court that she had advised her clients to provide her with access to all student files, to include original files and records that the school district "**may no longer have access to because the [employees] had it either on paper** or in electronic communications that they forwarded to their personal email accounts" and "information that the school would have generated that they had either forwarded to their personal home address or had in a paper format or other format that **wouldn't necessarily be readily accessible** to the school." *Id.* (emphasis added). This representation, along with

color photographs of files and bags containing files, indicated to all at the hearing that employees had, in addition to granting access to their District-issued laptops, physically removed records from the District and provided them to Ms. Mell. Judge Larkin affirmed that this unwarranted wholesale disclosure was not in keeping with his direction and that "[the District is] not asking for this whole universe of things and I'm **not** ordering you to provide that to them." *Id.* At no time did Judge Larkin affirm or agree with Defendants' self-serving "interpretation" of his direction.

II. ARGUMENT

1. The Trial Court's Conclusion That Segregation And Identification Of the Disclosed Student Educational Records Violated Attorney-Client Privilege Is Contrary to Established and Settled Law

It is not without accident that the trial court's January 15, 2016, Order refusing to order the Defendants to identify and disclose the student educational records provided to III Branches Law and other third parties was made without citation to supporting law. That is because there is no law in Washington that holds records developed for a third-party, that pre-existed the attorney-client relationship, and that contain no communications of or between the attorney and client are protected by the attorney-client privilege. To the contrary, the prevailing and governing law would dictate that these student educational records at issue are not protected from identification under any claim of privilege. Indeed, the District has always sought the identification of the records provided by the employees to their non-District attorney *and third-parties.*

Importantly, the trial court did not conclude that the records comprised solely, primarily, or even some, attorney-client communications. The District concedes that if the records contained communications of and between counsel and her clients, there

would be a basis for asserting the privilege. However, in this case, both the Defendants and the Court admit that the records are student educational records unaltered by attorney-client communications. As such, they should have been identified and disclosed.

Faced with *Morgan v. City of Federal Way*, Defendants are simply silent. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 755, 213 P.3d 596 (2009) (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439 (2004) (attorney-client privilege does not extend to documents that are prepared by third parties or for some other purpose than communicating with an attorney). They do not argue against the law or assert it does not control in this instance. The District asks this Court therefore to accept that that *Morgan* controls, does not support the trial court's conclusions, and warrants reversal.

2. FERPA Does Not Make Exception For Provision of Student Records To Non-District Attorney for Purported "Whistleblowing" Purposes and This Court Should Not Follow Suit

To be clear, the District has not asked the "Lincoln Ladies and their attorney to reveal what was communicated to establish a FERPA violation to impose discipline to silence their whistleblowing." Resp. Br. P. 12. The District has consistently sought and asked for the identification of student educational records provided to non-District third parties in order to address the conduct, prevent further breaches, and protect its federal funding. See 20 U.S.C. §1232g(b)(1)("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records... of students without the written consent of their parents to any individual, agency, or organization..." other than as expressly prescribed under the law) and Federal Register Vol. 73, No. 237 at p. 74844

(December 9, 2008)(directing educational agencies to "take steps immediately to retrieve data and prevent any further disclosures" when there is an unauthorized release or disclosure of student records.). The underlying complaint did not request the trial court enjoin employees from expressing concerns to any branch of government and, in fact, the Defendants availed themselves of those avenues after the lawsuit was filed. The complaint was appropriately limited to seeking injunctive relief in the form of return of student educational records and injunction to prevent further unlawful disclosures.

One of the ways that a District can ensure that employee behavior not in conformance with policy and procedure does not become practice of the District, as proscribed by 20 U.S.C. 1232g(b)(1), is by enforcing the existing policies and procedures. *Cf. Legacy Roofing, Inc. v. State, Dept. of Labor and Industries*, 129 Wash.App. 356, 372, 119 P. 3d 366 (2005)(discussing law in Washington regarding policies as applied in practice v. in theory in context of affirmative defense of unpreventable employee misconduct). Thus, it is imperative that a school district have access to confidential records disclosed in violation of FERPA and policy and procedure. Further, identification of the specific records at issue that were disclosed to third parties is not only relevant to the replevin action, but also so that the District may comply with its obligations under federal law to advise students and parents and maintain a record of when a disclosure has been made, as required by 20 U.S.C. § 1232g(b)(4)(A).

Defendants urge this Court to adopt a rule protecting from identification student educational records submitted to a non-district attorney because the records are alleged to be critical to pursuing concerns expressed on "matters of public concern".[7] However, the identification of records disclosed in violation of federal and state law and District

[7] The District disputes that the complaint received in August 2014 was a whistleblowing complaint.

policy and procedure does not preclude or impact whistleblowing or other protected activity. As the Defendants were repeatedly told prior to the lawsuit being filed, they could avail themselves of the Public Records Act, RCW 42.56 *et. seq.*, which would allow for production of records de-identified according to federal regulation and policy.

The irony of course is that the disclosure to III Branches was **unnecessary** to the pursuit of the purported whistleblower complaint where the education records then used to file reports with the media and ostensibly to other third parties were de-identified. Neither the email report to Superintendent Santorno in August 2014, nor the complaints filed with administrative agencies after the lawsuit was filed actually rested on or necessitated information specific to any student and/or his or her identity. And it was not necessary for the employees' attorney to know the specific confidential particulars of any student in order to file the complaints.

Quite simply put, the First Amendment does not authorize unfettered access to any and all records, even if protected by law, simply because a person with conditional access claims they may (but not actually) use them in a future whistleblowing complaint. That would mean any person's medical records, bank records, and tax records are all subject to disclosure to a privately retained attorney without consent under the guise of the First Amendment's right to potentially "petition the Government for a redress of grievances." This is not what the First Amendment requires.

3. Court Did Not Rule On CR 60 Motion, Hence, Judge Larkin's Order Was Law Of The Case

The trial court did not, in its order of March 25, 2016, or at any time, rule on the CR 60 motion or even refer to the motion in its Order on summary judgment. The trial court did not express any rationale for entering a ruling contrary to the standing order of a duly authorized trial court, and to permit such a ruling upsets the doctrine of finality and stare decisis. The CR 60 motion was untimely where it was filed six months after

the order was entered. CR 60(b) requires a movant file for relief within a reasonable time. Until it was inexplicably reversed on remand, Judge Larkin's Order had not been made void and there is no legal authority for denying that court the judicial discretion authorized under Chapters 2.28 and 2.08 of the Revised Code of Washington. As the Court of Appeals also noted in its order denying discretionary review, the limited stay granted by RCW 4.24.525 was lifted immediately on denial of the Motion to Strike. That meant that Judge Larkin had the discretion to administer the case before it and enter any orders appropriate, including ordering Defendants return the confidential student educational records disclosed prior to October 1, 2014.

CROSS-APPEAL

Defendants cross-appeal and ask this Court to grant them relief in the form of attorney's fees, costs, and statutory penalties under a claim of immunity. As discussed below, however, the statute they rely on does not apply to this factual circumstance. Nor does RCW Chapter 42.41 (whistleblower protection applied to local governments) offer any immunity because that chapter expressly prohibits disclosure of confidential material to support a complaint. RCW 42.41.045(2) ("Nothing in this section authorizes an individual to disclose information prohibited by law."). There is no enforceable statute that permits the Defendants to engage in the misconduct at issue and receive the protection of immunity or demand statutory sanctions under a claim of immunity.

4. The Anti-SLAPP Statute On Which Defendants Continue to Rely For Immunity Has Been Vacated in Its Entirety and RCW 4.24.510 Does Not Apply to Immunize Communications to a Private Sector Attorney

Judge Larkin's order quite clearly and correctly concluded that "RCW 4.24.525(2) does not apply when a school district employee discloses student educational records, as defined under FERPA, to an attorney who is not an attorney for the district; the defendants' special motion to strike is denied in its entirety." CP (7/8/15) 91-92. Faced with that ruling and then the abrogation of the Anti-SLAPP law by the court in *Davis v. Cox*, 183 Wn.2d 269 (2015), Defendants attempted before Judge Whitener to shoehorn their defense into another immunity statute to assert right to relief and fees.

As the District argued in the trial court below, RCW 4.24.510 is not applicable to the instant action because the communication at issue in the lawsuit, the disclosure of private student records, was to private counsel and not to any branch of government. RCW 4.24.510, Communication to Government Agency or Self-Regulatory Organization (protection extends only to immunize a complainant for "civil liability for claims based upon the communication *to the agency or organization*."). RCW 4.24.510 expressly protects disclosures to branches of government because it is intended to protect communications of concern to that agency. In this case, the fact the ***no disclosure*** was made to any agency of government prior to the lawsuit being filed, in support of any communication of a concern, but ***only*** to a private sector attorney and the news media and unidentified third parties, further removes the necessity for the protection.

5. Private Attorneys Are Not Held to The Standards of The Judicial Branch and, Thus, Are Not Members of the Same

In the face of RCW 4.24.510's plain language limiting immunity to persons communicating with governmental agencies, Defendants argue that III Branches Law and Joan Mell are members of the judiciary branch. No matter how much the defendants attempt to distort the meaning of "judiciary," it is defined in Article IV of

the Wa. State Const., as "the supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." It does not include the attorneys who appear before any of those bodies, or who, by virtue of their professional code of practice as lawyers, are required to adhere to a higher standard as an "officer of the court." Nor does *Washington State Bar Ass'n v. State*, 125 Wash.2d 901, 890 P.2d 1047 (1995), hold that possessing regulatory control over attorneys as officers of the court paradoxically renders those attorneys members of the judiciary that exercises that regulatory control.

Further, there is no question that private attorneys are not imbued with the authority of the judiciary or authorized to engage in the functions of the judiciary. RCW 2.28.030. Private attorneys may not administer oaths; nor can they compel attendance, obedience, or punish for contempt. *See generally*, RCW Chapter 2.28. More importantly given the issues in this case, private attorneys are not required to comply with the Canon of the Code of Judicial Conduct, including that requiring integrity and impartiality. *See Matter of Disciplinary Proceeding Against Sanders*, 135 Wash.2d 175, 181-82, 185-88, 955 P.2d 369 (1998).

III. CONCLUSION

For all the foregoing reasons, the District respectfully requests that this Court reverse the Superior Court's erroneous grant of summary judgment and remand for proceedings consistent with its opinion, including immediate disclosure to the District of the records that had been taken prior to October 1, 2014, and disclosed to third parties in violation of federal and state law. District also asks that this Court deny Defendants' cross-appeal, to include their request for fees where no applicable statute authorizes same.

RESPECTFULLY SUBMITTED this 27th day of October, 2016

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CERTIFICATE OF SERVICE

I, Hye Y. Kim, hereby declare that on this 27th day of October, 2016, I caused a true and correct copy of the foregoing to be served on following in the manner indicated below:

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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 27th day of October, 2016, at Seattle, Washington.

s/*Hye Y. Kim*
Hye Y. Kim
Legal Assistant